APPENDIX A

[Filed Nov. 28, 1995]

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 94-2198
(D.C. No. CIV-93-1129-M)
(D. New Mexico)

MINNIE BUTLER, MOODY H. DAVIS, PATRICIA DAVIS, and THE BURK B. ROBERTS TRUST,
Plaintiffs-Appellants,

v.

STUART D. SHANOR, Trustee,
Defendant-Appellee.

ORDER AND JUDGMENT *

Before MOORE and LOGAN, Circuit Judges, and O'CONNOR, District Judge.**

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* This order and jujdgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of the court's General Order filed November 29, 1993. 151 F.R.D. 470.

** The Honorable Earl E. O'Connor, Senior District Judge for the United States District Court for the District of Kansas, sitting by designation.

This appeal arises from an ongoing dispute between Stuart D. Shanor, Chapter 7 Trustee of the bankruptcy estate of Bellamah Community Development, and Minnie Butler, Moody H. Davis, Patricia Davis, and the Burk B. Roberts Trust (The Davis Group). The Davis Group held the first consensual lien on property which was part of the bankruptcy estate. Over the Davis Group's objection, Mr. Shanor, as trustee, abandoned the property with the bankruptcy court's approval. The Davis Group challenged the trustee's ability to abandon the property and his responsibility for paying the ad valorem taxes which had accrued against the property during the pendency of the bankruptcy proceedings. The Davis Group contends the bankruptcy and district courts erred in denying their challenge. We disagree and affirm.

The instant case began when Mr. Shanor filed an adversary action in the United States Bankruptcy Court for the District of New Mexico seeking a declaratory judgment that his failure to pay the ad valorem taxes on the abandoned property was appropriate. After concluding it had jurisdiction over the dispute as a core proceeding, 29 U.S.C. § 157(b)(2), the bankruptcy court granted the declaratory judgment by summary judgment. The Davis Group appealed this decision to the district court.

Rather than conducting its own review, the district court referred the appeal to a magistrate judge. The magistrate judge recommended the bankruptcy court be affirmed. The district court adopted the magistrate's proposed findings of fact and recommendation as its final order. The Davis Group now appeals that decision.

The underlying facts are well known to the parties, and they need not be reiterated for the purpose of this disposition. We are called upon to determine whether the bankruptcy court properly exercised its jurisdiction and whether the ad valorem taxes on the Davis Group property became an expense of administration which the trustee was obli-

gated to pay. We conclude there was jurisdiction and that the ad valorem taxes never became a burden of the estate.

We review a grant of summary judgment de novo, applying Fed. R. Civ. P. 56 identically as the district court. *Hooks v. Diamond Crystal Specialty Foods, Inc.*, 997 F.2d 793, 796 (10th Cir. 1993). On appeal, all the evidence is considered in the light most favorable to the non-moving party. *Applied Genetics Int'l v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241 (10th Cir. 1990). Summary judgment is appropriate only if there is no genuine issue of material fact for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-87 (1986).

The bankruptcy code provides, in relevant part:

> 28 U.S.C. § 157. Procedures
>
> . . . .
>
> (b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.
>
> (2) Core proceedings include, but are not limited to—(A) matters concerning the administration of the estate;
>
> . . . .
>
> and
>
> (O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.

"Core proceedings are proceedings which have no existence outside of bankruptcy. Actions which do not de-

pend on the bankruptcy laws for their existence and which could proceed in another court are not core proceedings." *In re Gardner,* 913 F.2d 1515, 1518 (10th Cir. 1990) (per curiam) (citations omitted). In this case, the trustee sought a declaratory judgment to clarify his responsibility for paying ad valorem taxes on property that passed through the estate. Because the Davis Group asserted the payment of the ad valorem taxes were a burden upon the estate and payable as an administrative claim, it is unassailable that the issues raised were "matters concerning the administration of the estate," and matters "affecting the liquidation of the assets of the estate." 28 U.S.C. §§ 157(2)(A) and (O). Thus, the bankruptcy court had jurisdiction to issue a final order and judgment in this case pursuant to section 157(b)(1).

The Davis Group also argues that the bankruptcy court should have exercised its discretion not to grant declaratory relief because of the pendency of other litigation between the parties in another forum. Whether the declaratory action should be entertained is a matter committed to the exercise of the sound discretion of the trial court. *Kunkel v. Continental Cas. Co.,* 866 F.2d 1269, 1273 (10th Cir. 1989) (citing *Alabama State Fed'n of Labor v. McAdory,* 325 U.S. 450, 462 (1945)). There was no abuse here because the trustee's duties are defined by the Bankruptcy Code, the interpretation of which is within the jurisdiction of the bankruptcy court. Therefore, we believe the existence of another lawsuit outside the bankruptcy forum is not a reason for the bankruptcy court to defer the exercise of its lawful authority.

The Davis Group next argues the trustee had the obligation to pay the ad valorem taxes which accrued on the property prior to abandonment. They predicate their argument upon the belief the trustee was operating the debtor's business; consequently, he became responsible for the ad valorem taxes that accrued during that operation. 28 U.S.C. §§ 959 and 960.

While we agree an operating trustee is subject to those provisions, *In re Kaiser Steel Corp.*, 87 B.R. 662, 665 (Bankr. D. Colo. 1988), nothing in the record suggests they are applicable here. Although the Davis Group argues the issue of whether the trustee was operating the debtor's business is contested, there is no apparent disagreement over the underlying facts.

It is undisputed the trustee attempted to sell the property in which the Davis Group held an interest as he did all the property which came into the estate. The Davis Group contends that because the debtor was in the business of selling property, the trustee must have been operating that business. Their contention belies a fundamental misunderstanding of the role of a trustee in bankruptcy.

Among the principal duties of a liquidating trustee is the obligation to marshal the assets of the estate and dispose of them in a manner that will best protect the interests of the entire estate. 11 U.S.C. § 544. That is what the trustee did in this case. Although he ultimately abandoned the Davis Group property, he initially attempted to liquidate it for the benefit of the estate. That effort does not constitute the operation of the debtor's business.

Moreover, the simple fact the trustee obtained the court's authority to operate the business is not evidence he did so. Nothing is suggested by the Davis Group indicating the trustee stepped in the debtor's shoes and operated the business the debtor conducted prior to bankruptcy.

More fundamentally, the abandonment of the property by the trustee under 11 U.S.C. § 544 excludes it from the burden of administration as part of the assets of the estate. We have said:

> Property abandoned under this section ceases to be part of the estate. It reverts to the debtor and stands as if no bankruptcy petition had been filed. Follow-

> ing abandonment, "whoever had the possessory right to the property at the filing of bankruptcy again reaquires that right." Abandoned property is *not* property administered by the estate.

In Re Dewsnup, 908 F.2d 588, 590 (10th Cir. 1990) (per curiam) (citations omitted and emphasis in original), *aff'd* 502 U.S. 410 (1992). Other courts have followed this general rule that abandonment of estate property nullifies its previous relationship to the bankruptcy estate. *See In re Argiannis,* 156 B.R. 683, 688 (Bankr. M.D. Fla. 1993); *In re J.A.V. AG., Inc.,* 154 B.R. 923, 926 and n.5 (Bankr. W.D. Tex. 1993); *In re Wilson,* 94 B.R. 886, 888 (Bankr. E.D. VA 1989); *In re McGowan,* 95 B.R. 104, 106 (Bankr. N.D. Iowa 1988); *In re Painter,* 84 B.R. 59, 62 (Bankr. W.D. VA 1988).

On its face, this general rule of the effect of abandonment governs the resolution of this case. It is simply unarguable that because the estate no longer possessed any interest in the property it had no responsibility to pay the ad valorem taxes. Yet, even if abandonment had not occurred, the results might still be the same.

As the trustee explains, in bankruptcy proceedings the payment of ad valorem taxes is subject to two basic approaches. If the trustee liquidates the property, the accumulated taxes could be paid as an administrative expense. 11 U.S.C. §§ 503(b)(1)(B) and 507(a)(7)(B). However, because ad valorem taxes are a burden upon, and follow the property, the second approach would be to reduce the liquidating price of the property to reflect the amount of the tax lien and convey the property subject to the taxes. In such a transaction, the purchaser becomes liable for the ad valorem taxes.

The Davis Group ignores these distinctions and insists there is no alternative but for the trustee to pay the ad valorem taxes that accumulated while the property was part of the bankruptcy estate. Of course, this is

tantamount to shifting the burden of the tax to the unsecured creditors of the estate to free the Davis Group from the lien that follows the property.

It is fundamental the trustee had no authority to pay the ad valorem taxes in this case because there was no request for payment by the taxing authorities. 11 U.S.C. § 503(a). Under this section, it is the taxing authority, not the creditors, that determines the potential liability of the bankruptcy estate for the payment of ad valorem taxes. Thus, although assessed against property administered by the estate, the ad valorem taxes never became an expense of administration in this estate because no such request was ever made.

Additionally, the Davis Group contention also ignores 11 U.S.C. § 502(b)(3). Because the amount of the liens on the Davis Group property exceeded its value, this section would have barred the payment of these ad valorem taxes as a claim against the estate.

It is further noteworthy the Davis Group could have protected itself from the accumulation of tax liens during the early stages of the bankruptcy proceeding by seeking abandonment, or by requesting the bankruptcy court to grant it relief from stay so it could enforce its own lien. It did neither. Instead, it followed the unusual step of seeking to intervene in an attempt by the holder of the second consensual lien to obtain relief from stay. After rejection of this effort, the Davis Group abandoned its appeal from the denial. We therefore conclude the Davis Group has demonstrated no equitable reason why the unsecured creditors should bear the burden of taxes upon the abandoned property ultimately coming into the hands of the Davis Group.

AFFIRMED.

Entered for the Court

JOHN PORFILIO MOORE
Circuit Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civ. No. 93-1129 M/WWD

MINNIE BUTLER, MOODY H. DAVIS, PATRICIA DAVIS, and THE BURK B. ROBERTS TRUST,
Appellants,

vs.

STUART D. SHANOR, TRUSTEE,
Appellee.

MAGISTRATE JUDGE'S PROPOSED FINDINGS AND RECOMMENDED DISPOSITION

Proposed Findings

1. This matter comes before the Court on appeal from the United States Bankruptcy Court. 28 U.S.C. § 158(a). Appellants Minnie Butler, Moody H. Davis, Patricia Davis, and The Burk B. Roberts Trust ("Davis"), Defendants below, appeal from an order entered September 3, 1993, granting a motion for partial summary judgment of Appellee Stuart D. Shanor, Chapter 7 Trustee ("Trustee"), Plaintiff below, on Count II of the Complaint. Count I of the Complaint having been previously resolved, the referenced order is final and this Court has jurisdiction to consider the appeal.

2. Davis asserts seven errors by the bankruptcy court which can be distilled to two issues:

(a) Whether the bankruptcy court ruled correctly that Count II of the complaint is a core proceeding, 28 U.S.C. § 157(b)(2), and

(b) Whether the bankruptcy court ruled correctly that the Trustee's failure to pay certain real property taxes was proper.

Trustee states the issue as whether his abandonment of the property precluded any property tax obligation on the Trustee.

3. We review this matter *de novo. In re Mullet,* 817 F.2d 677 (10th Cir. 1987). No genuine issues of fact were presented in opposition to the Trustee's motion.

4. The facts are as follows. Davis sold certain real property to Bellamah Community Development, taking back a first lien. Bellamah later filed under the bankruptcy code, and, upon conversion to Chapter 7, the Trustee was appointed. Liens against the property exceeded its value, and between the time of filing and conversion to Chapter 7 *ad valorem* taxes accrued in the amount of $367,000. After attempting to sell the property, the Trustee abandoned the property under 11 U.S.C. § 554. No property taxes were paid by the Trustee.

5. The bankruptcy court correctly ruled that Count II of the complaint is a core proceeding. Core proceedings are those matters in which the bankruptcy court may enter final orders and judgments, such as administration of the estate and adjustment of the debtor-creditor relationship, 28 U.S.C. § 157, and which would have no existence except for the bankruptcy. *Gardner v. United States (In re Gardner),* 913 F.2d 1515, 1518 (10th Cir. 1990). Davis argues that this case presents an exception to the conceded rule that the Trustee may not be sued outside the bankruptcy court without leave of that court. The exception, found in 28 U.S.C. § 959, allows actions against trustees resulting from conduct of estate

busines. Here, although the Trustee was authorized to operate the debtor's business under 11 U.S.C. § 721, his only actions with respect to this property were attempts to sell followed by abandonment. Davis' argument is based on liquidation issues or actual carrying on of the debtor's business, and ignores the fact of abandonment. *See Allard v. Weitzman (In re DeLorean Motor Co.),* 991 F.2d 1236 (6th Cir. 1993); *U. and I., Inc. v. Fitzgerald (Matter of Campbell),* 13 B.R. 974 (Bankr. D. Idaho 1981). Count II of the complaint does not constitute an exception to the rules regarding actions against trustees and is, therefore, a core proceeding.

6. The bankruptcy court correctly granted summary judgment as to the Trustee's duty to pay *ad valorem* property taxes. Davis argues that (a) a fact issue exists whether the Trustee was actually carrying on the business of the subject property, and (b) because the Trustee was operating this property, he was liable for the *ad valorem* taxes. The proffered evidence consists of obligatory operating reports, 11 U.S.C. § 704(8), and shows nothing more than that the Trustee was attempting to sell the property prior to abandonment. *See Matter of Campbell,* 13 B.R. at 976, supra. The bankruptcy court correctly ruled that no evidence was adduced to show that the Trustee was carrying on the business of this property.

7. Even assuming *arguendo* that the Trustee operated the property in the interim, he had neither the duty nor the authority to pay the *ad valorem* taxes. When the property was abandoned, the legal effect was that it had never been in the estate and thus no taxes were owed. *Dewsnup v. Timm (In re Dewsnup),* 908 F.2d 588, 590 (10th Cir. 1990); aff'd 502 U.S. ——, 112 S.Ct. 773 (1992); *Terjen v. Santaro (In re Terjen),* 154 B.R. 456 (E.D. Va. 1993); *In re Skinner Lumber Co.,* 35 B.R. 31 (Bankr. D.S.C. 1983).

8. The Davis brief discusses at some length certain rules with respect to declaratory judgment actions. The

brief does not assert, nor offer evidence of, abuse of discretion by the bankruptcy court in hearing this proceeding. *Kunkel v. Continental Casualty Co.*, 866 F.2d 1269 (10th Cir. 1989).

9. The Davis brief requests oral argument. On the basis of the full record and comprehensive briefs, and in particular because Davis chose not to submit a reply brief, this request should be denied as unnecessary.

10. Within ten days after a party is served with a copy of these proposed findings and recommendations that party may, pursuant to 28 U.S.C. § 636(b)(1), file written objections to such proposed findings and recommendations.

Recommended Disposition

I recommend that the request for oral argument be denied and the order of the Bankruptcy Court be affirmed.

/s/ William W. Deaton
WILLIAM W. DEATON
United States Magistrate Judge

APPENDIX C

[Filed Aug. 31, 1994]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civ. No. 93-1129 M/WWD

MINNIE BUTLER, MOODY H. DAVIS, PATRICIA DAVIS and THE BURK B. ROBERTS TRUST,
Appellants,

vs.

STUART D. SHANOR, TRUSTEE,
Appellee.

ORDER

THIS MATTER having come before the Court on the proposed findings and recommendation of the magistrate judge; objections having been made to the proposed findings and recommendation; and the Court, after a de novo determination, having found that the objections are not well taken, and that the proposed findings and recommendation of the magistrate judge should be adopted by the Court;

IT IS ORDERED THAT the Order of the Bankruptcy Court from which this appeal was taken be, and it is hereby, AFFIRMED.

/s/ [Illegible]
United States District Judge

APPENDIX D

[Filed Sep. 5, 1993]

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

IN RE BELLAMAH COMMUNITY DEVELOPMENT,
a New Mexico general partnership,
Employer ID No. 85-0296658,
Debtor.

No. 7-89-01559 M A

Adversary 92-1112 M

STUART D. SHANOR, Trustee,
Plaintiff,

v.

MINNIE BUTLER, MOODY H. DAVIS, PATRICIA DAVIS
and THE BURK B. ROBERTS TRUST,
Defendants.

ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT, ON TRUSTEE'S MOTION FOR ATTORNEY'S FEES AND ON DEFENDANTS' MOTION FOR DETERMINATION OF ADVERSARY PROCEEDING AS NON-CORE

This matter came before this Court on the following motions: (1) Plaintiff's Motion for Partial Summary Judgment, (2) Defendants' Cross-Motion for Partial Sum-

mary Judgment, (3) Defendants' Motion for Determination of Adversary Proceeding as Non-Core, and (4) Plaintiff's Motion for Award of Attorney's Fees. Having considered the facts, the memoranda of law, the applicable law, the argument of counsel and otherwise being fully informed and advised, the Court finds that the Plaintiff's Motion for Partial Summary Judgment is well taken and will be granted as to Count II of the complaint, which the Court finds is a core proceeding. Plaintiff's Motion for Award of Attorney's Fees will be denied. Having determined that Count I of the complaint is a non-core, related to proceeding, the Court will make proposed findings of fact and conclusions of law in a separate document.

MOTION FOR SUMMARY JUDGMENT ON COUNT II

Count II of the Plaintiff's complaint seeks a declaration that the Trustee's failure to pay the real property taxes on certain real property on the estate known as the LakePointe property was appropriate. This Court holds that Count II is a core proceeding under 28 U.S.C. § 157(b)(2). Defendants have provided no facts or legal authority to show that the Trustee was authorized or required to pay pre- or post-petition real property taxes on the Lakepointe property, which was eventually abandoned. Based on the undisputed facts, the Court will grant the Plaintiff summary judgment on Count I of his complaint and hold that his nonpayment of taxes was appropriate.

TRUSTEE'S MOTION FOR ATTORNEY'S FEES

In Count I of the complaint, and in his Supplemental Brief in Support of Motion for Partial Summary Judgment: Award of Attorney's Fees, Plaintiff asks this Court to award him the attorney's fees, costs and expenses incurred by the bankruptcy estate in defending the action in the United States District Court for the Eastern Dis-

trict of Texas and in prosecuting this adversary proceeding. As for this motion, even though such fees are requested as part of Count I, the non-core, related to, count of Plaintiff's complaint, the Court holds that the Plaintiff's request for attorney's fees pursuant to Section 105 or 362 of the Bankruptcy Code is clearly a core matter in which this Court can issue a final order.

Plaintiff asserts two grounds for the award of attorney's fees: (1) the Defendants' willful violation of the automatic stay under 11 U.S.C. § 362(h) in bringing the Texas lawsuit against Plaintiff, and (2) the Defendants' lack of a good faith basis in bringing the Texas action under 28 U.S.C. § 959(a).[1]

As for the Court's power under § 362(h) to award damages and attorney's fees for a willful violation of the stay, the Court finds that Plaintiff has made an insufficient showing of Defendants' willful violation of the stay. Although this Court has the power to sanction parties for civil contempt under § 105(a), *see, In Re: Skinner,* 917 F.2d 444 (10th Cir. 1990), Plaintiff has not properly brought this as a civil contempt proceeding, and on the facts presented, the Court could not find that Defendants committed civil contempt of this Court. As to whether the Defendants should be liable to the Plaintiff for attorney fees under Federal Rule of Civil Procedure 11, this Court holds that that question is only properly addressed in the Texas proceeding.

IT IS ORDERED that the Plaintiff's Motion for Summary Judgment is granted as to Count II, the Defendants'

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[1] Section 959(a) provides in pertinent part:

> Trustees, receivers or managers of any property, including debtors in possession, may be sued, without leave of the court appointing them, with respect to any of their acts or transactions in carrying on business connected with such property. Such actions shall be subject to the general equity power of such court so far as the same may be necessary to the ends of justice, but this shall not deprive a litigant of his right to trial by jury.

Cross Motion for Summary Judgment is denied, Defendants' Motion for Determination of Plaintiff's Motion for Award of Attorney's Fees is denied.

/s/ Mark B. McFeeley
MARK B. MCFEELEY
United States Bankruptcy Court

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 94-2198

MINNIE BUTLER, MOODY H. DAVIS, PATRICIA DAVIS, THE BURK B. ROBERTS TRUST,
Plaintiffs-Appellants,
v.

STUART D. SHANOR, Trustee,
Defendant-Appellee.

ORDER

Entered January 30, 1996

Before PORFILIO and LOGAN, Circuit Judges, and O'CONNOR *, District Judge.

This matter comes on for consideration of appellants' petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

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* Honorable Earl E. O'Connor, Senior District Judge for the United States District Court for the District of Kansas, sitting by designation.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court

PATRICK FISHER
Clerk

By /s/ Audrey F. Weigel
Deputy Clerk